# Miller, Brexit and the (maybe not to so evil) Court of Justice

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Daniel Sarmiento Di 8 Nov 2016

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In *Miller*, the High Court of England and Wales has ruled that Article 50 TEU must be triggered by Parliament and not by the Crown. The reasoning of the judgment is clear and logical. I would even add that it is elegant and stylish in its typically British sobriety.

But the decision is deeply flawed.

In paragraph 10 of the judgment, the High Court relies on the common position of all parties in the proceedings, according to which the notice of withdrawal under Article 50 TEU is irrevocable. Therefore, once Parliament or the Crown has triggered the procedure, there is no turning back. The High Court is quite clever by simply stating that this issue was not subject to debate by the parties. They all agreed on this: a notice of withdrawal is irrevocable. Therefore, the High Court says, irrevocable it is.

I am afraid it is not. And even if I am wrong, I am certain when I say that this question is completely open and subject to interpretation.

There are plenty of highly elaborate articles on the question of irrevocability of a withdrawal notice pursuant to Article 50 TEU. I will only referer, by way of example, to two very respectable authorities: Jean-Claude Piris, former director of the legal services of the Council, and Paul Craig, Professor of Law in Oxford University and a leading author in the field. Both agree that Article 50 TEU must be interpreted in such a way that a Member State is entitled to withdraw an application ("the withdrawal of the withdrawal", as it is commonly termed) if it finally changes its mind in good faith. I would personally add that this should be made conditional on the unanimous agreement of the European Council, but this is, as well, open to interpretation.

The consequences of this interpretative question are enormous in the case of Miller, mostly because the High Court assumes that the triggering of Article 50 TEU entails, per se, a deprivation of rights that had been previously granted by Parliament. The rationale of the judgment is implacable: once Article 50 TEU is triggered, there is no turning back, and thus the loss of rights is inevitable. The loss will occur sooner or later, but it will certainly happen. And if those rights were granted by Parliament, only Parliament can take them away.

However, the High Court is relying on a more than dubious reading of Article 50 TEU, insofar the question of revocability is completely open and subject to interpretation. In fact, there are many more chances that an Article 50 TEU application will be revocable than the contrary, for the simple reason that the latter sits uncomfortably with common sense. Let us just imagine the following scenario: Article 50 negotiations begin between the UK and the EU and the backlash from markets is so enormous that the turmoil in the UK leads to a general election. To the surprise of many, liberals and labour win a large majority on the argument of stopping the process. As a result, the new coalition government would have a clear mandate to put an end to Brexit. The EU would not object for all the obvious reasons. The UK would terminate the process of leaving the EU after a second democratic decision of the British people. Is it reasonable to say that in these circumstances the withdrawal negotiations must go on? Is the Treaty really telling the Member States to carry on negotiating even if nobody wishes the negotiations to carry on? Is it really as ridiculous as that, or isn't it more reasonable to assume that the UK, after a clear mandate of the British people, and with the unanimous agreement of the 27 member European Council, can withdraw the application and put an end to the withdrawal procedure?

I have always been an admirer of the British legal system, mostly for its taste for common sense and practicality. But in this case I must admit that I completely disagree with the reading that the High Court has purported in Miller, precisely for its lack of all practical rationale. It is impossible, I would even say preposterous, to assume that a Member State has to be forced to withdraw, no matter what happens, once it has triggered the procedure

envisaged in Article 50 TEU.

Therefore, by reaching this very flawed conclusion in paragraph 10, the entire judgment falls apart like a house of cards. If the withdrawal notice is revocable, then there is certainly no deprivation of rights until the procedure has effectively terminated. As a result, the Crown can trigger the procedure and put it to rest as well. Therefore, the Crown, by triggering the procedure, is not depriving anybody of their rights.

The High Court was of course very much aware of all this. The reason why it probably relied on such a brittle foundation is quite simple: it was probably just trying to avoid making a reference to the Court of Justice. I am afraid that is the reason. But the price to be paid is quite high: a judgment that is now the subject of enormous political tension and constitutional debate in Britain is flawed from its very premise.

One wonders why the High Court is so reluctant to make the reference to Luxembourg. There is a political explanation that comes immediately to my mind: such a sensitive case cannot be left in the hands of the Court of Justice. It would be a humiliation and an unpalatable course of events for the now all-mighty Brexiteers that currently rule Britain.

But there is another and much more practical reason. A preliminary reference procedure could take up to a year and a half to be dealt with. Of course nobody wants these proceedings to drag on for such a long time.

Therefore, the question is whether the Court of Justice can decide such a case by way of an expedited procedure, and in what time-frame.

The Court of Justice can certainly make use of the expedited procedure in a case such as Miller. If it was used in Pringle, it would be unimaginable to discard it in a case like Miller, in which another question of huge constitutional relevance is raised. In fact, Pringle is a very useful reference, because it was decided by the Plenary of the Court, a full 28 judge formation, and in only four months. It could even be argued that it was decided in three months, because the preliminary reference was filed on the 31$^{st}$ of July and the Court is on holidays during the month of August.

But is it possible to solve a preliminary reference in an even shorter time-frame than the one in Pringle? For example, can the full Court rule in only one or two months? If the Supreme Court, that is about to hear the appeal against the High Court's decision, decides to make a reference immediately, could it expect a judgment from the Court of Justice by mid-January 2017? The time-frame is very relevant, because a judgment from Luxembourg in mid-January would allow the Supreme Court to rule by the end of January or early February. In that case, if the Supreme Court ruled in favor of the Crown, Theresa May's calendar would remain unaltered and it would be possible to file a withdrawal application in March 2017, as announced.

According to Article 105 of the Rules of Procedure ("RP") of the Court of Justice, the expedited procedure allows the President to derogate from the general provisions. The only rules of the RP that the President cannot waive are those provided in Articles 105 and 106 RP. From these provisions it seems clear that the President cannot omit the written part of the procedure (as it can in an urgent preliminary reference procedure, pursuant to Article 111 RP). In fact, Article 105 RP ensures a minimum 15 day time-period to all the parties to file their written submissions.

However, things can go quite quickly after that.

If the Supreme Court referred the case to Luxembourg, say, on 8 December 2016, the Court of Justice could immediately serve all the parties in the main proceedings and interveners and grant them 15 days only to submit written observations. The President could fix the date of the hearing on Tuesday, the 3$^{rd}$ of January. The Advocate General would be heard orally on the 5$^{th}$ of January and the Court would deliberate on its traditional Friday morning Grand Chamber deliberation day, on January the 6$^{th}$. The draft judgment would be finalized and edited by the lecteurs d'arrêts by the 10$^{th}$ and ready for an expedited translation (to English only, at least for a time being) that would allow the Court to publish its decision on Tuesday 17 January 2017. This timeframe would allow the Supreme Court to deliberate during the following two or three weeks and thus allow, whatever the

outcome might be, either the Crown or Parliament the power to decide within the current time-frame announced by Theresa May.

Of course, as the reader will have noticed by now, there is a paradox to all this.

As a result of the High Court's refusal to make a reference to Luxembourg, hardcore Brexiteers are now facing a daunting prospect for their Brexit plans. However, a reference to the Court would probably provide Brexiteers with a welcome surprise, because I am quite certain that the Court would side with Piris and Craig on this one: Article 50 TEU is revocable for all the obvious reasons previously mentioned. In fact, a procedure in Luxembourg would grant all the Institutions concerned, and all the Member States, the chance to take a position on this crucial issue of EU constitutional principle. And I am quite certain that they would agree with Piris and Craig too.

If the Court followed this argument and came to the conclusion that Article 50 procedures are revocable, then the Supreme Court would have good reasons to overrule the judgment of the High Court. After all, if the withdrawal application is revocable, the Crown is not overstepping into Parliament's terrain, quite the contrary. No rights would be deprived from the decision of the Crown to trigger Article 50 TEU.

As strange as this might sound, hardcore Brexiteers have now their closest and most reliable ally not at home, but in what they have considered to be, all these years, the evil, monstrous, devilish, undemocratic, unelected, corrupt and dictatorial Court of Justice of the European Union.

Maybe they realize now that it is not such a bad Court, after all.

*This article has previously appeared on the author's blog Despite our Differences and is republished here with kind permission.*

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SUGGESTED CITATION Sarmiento, Daniel: *Miller, Brexit and the (maybe not to so evil) Court of Justice, VerfBlog,* 2016/11/08, http://verfassungsblog.de/miller-brexit-and-the-maybe-not-to-so-evil-court-of-justice/.